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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE, Plaintiff and Respondent, v. CLAUDELL MOORE, Defendant and Appellant.	C038925 (Super. Ct. Nos. 98CR0596, 01CR0251)

APPEAL from a judgment of the Superior Court of Amador County, David S. Richmond, J. Affirmed as modified.

Kyle Gee, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Carlos A. Martinez, Supervising Deputy Attorney General, Catherine G. Tennant, Deputy Attorney General for Plaintiff and Respondent.

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* Pursuant to rules 976(b) and 976.1 of the California Rules of Court, this opinion is certified for publication with the exception of parts II, III and IV of the DISCUSSION.

Defendant Claudell Moore pled guilty to bringing a controlled substance into prison (Pen. Code, § 4573; further undesignated statutory references are to the Penal Code; case No. 98CR0596, count one), transporting a controlled substance for sale to a noncontiguous county (Health & Saf. Code, § 11352, subd. (b); case No. 98CR0596, count two), felony failure to appear (§ 1320.5; case No. 98CR0596, count three), and custodial possession of a weapon (§ 4502, subd. (a); case No. 01CR0251, count one). He admitted a strike allegation (§§ 667, subds. (b)-(i), 1170.12) and two prior narcotics conviction allegations (Health & Saf. Code, § 11370.2, subd. (a)). He was sentenced to state prison for 12 years, consisting of double the midterm of six years on count two of case number 98CR0596; all other terms were stayed or made concurrent.[1] The trial court imposed a $2,400 restitution fine (§ 1202.4) and a $2,400 restitution fine suspended unless parole is revoked (§ 1202.45). Defendant obtained a certificate of probable cause.

On appeal, defendant contends the denial of his *Murgia*[2] discovery motion, which sought information with respect to whether defendant was prosecuted only because he is an African-American, (1) is cognizable after entry of a guilty plea, and (2) was an abuse of discretion. He also claims (3) the trial

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[1] In July 2002, the People dismissed case No. 01CR0251 in furtherance of justice.

[2] *Murgia v. Municipal Court* (1975) 15 Cal.3d 286.

court erred in its belief that the $2,400 restitution fines were "the minimum" required "by law."

In the published portion of the opinion, we shall conclude the denial of defendant's *Murgia* motion is cognizable on appeal even though defendant pled guilty. However, in the unpublished portion of the opinion, we shall determine the motion was correctly denied. We shall also conclude defendant may not complain about his restitution fines because he did not object in the trial court. We shall also modify the judgment to impose a mandatory laboratory analysis fee and associated penalty assessments. We shall affirm the judgment as modified.

FACTS[3]

In March 1998, a Mule Creek State Prison (Mule Creek) officer was informed that defendant had mailed a radio containing a large amount of heroin and marijuana to a current inmate. The officer located the radio amongst a co-defendant's personal property. Inside the radio were heroin, marijuana and a handwritten note that was wrapped in clear plastic. A fingerprint on the note was matched to defendant.

On August 16, 1999, defendant failed to appear for the criminal proceedings.

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[3] Because defendant pled guilty, our statement of facts is taken from the probation officer's report. The statement of facts is limited to case No. 98CR0596.

DISCUSSION

I

Defendant contends the denial of a *Murgia* discovery motion is cognizable on appeal after entry of a guilty plea. The People respond that review is precluded by our recent opinion in *People v. Hunter* (2002) 100 Cal.App.4th 37, in which review was denied October 16, 2002 (hereafter *Hunter*). Defendant has the better argument.

Background

Defendant filed a pretrial motion for discovery of prison records under *Murgia v. Municipal Court, supra,* 15 Cal.3d 286 (*Murgia*). *Murgia* held that "a criminal defendant may defend a criminal prosecution on the ground that he has been the subject of . . . 'intentional and purposeful' invidious discrimination," and that "traditional principles of criminal discovery mandate that defendants be permitted to discover information relevant to such a claim." (*Id.* at p. 306.)[4]

Defendant asserted he needed discovery to "show that he was deliberately singled out for prosecution on the basis of an invidious criterion," that he was black, and "that this prosecution would not have occurred but for the discriminatory

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[4] Section 1054, subdivision (e) recognizes that "discovery shall occur" "as mandated by the Constitution of the United States." *Murgia* discovery is based on the equal protection clauses of the federal and state Constitutions. (*Murgia, supra*, 15 Cal.3d 286, 294.)

design of the prosecution." The motion sought discovery of: (1) Mule Creek rule violation reports from January 1996 to December 1998 for all cases of violation of sections 4573 (bringing controlled substance into prison), 4573.6 (possession of controlled substance where prisoners are kept) and 4573.8 (possession of drugs or paraphernalia in jail or prison), and the race of each inmate involved; (2) the administrative disposition of all the foregoing cases, including whether the matter was referred to the district attorney for prosecution; (3) the disposition of all cases submitted to the district attorney from 1996 through December 1998; and (4) the percentage of the Mule Creek inmate population that is black.

In support of the motion, defendant submitted the declaration of his trial counsel and violation reports concerning various state prison inmates.

In opposition, the People submitted declarations by the court liaison officer and litigation coordinator at Mule Creek.

Following a hearing, the trial court denied the motion.

Analysis

"'It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute.' [Citation.]" (*People v. Mazurette* (2001) 24 Cal.4th 789, 792, followed in *Hunter, supra,* 100 Cal.App.4th 37, 40.)

Section 1237, subdivision (a) provides in relevant part: "An appeal may be taken by the defendant: [¶] (a) From a final

judgment of conviction except as provided in Section 1237.1 and Section 1237.5." "This section thus establishes 'the general rule that a criminal defendant can appeal only from final judgments and those orders deemed by statute to be final judgments.' [Citation.]" (*Hunter, supra,* 100 Cal.App.4th 37, 41.)

Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk." "Section 1237.5 is an exception to the general rule that appeals may not be brought by defendants who have pleaded guilty or nolo contendere. This section provides the general rule that defendants who have pleaded guilty must obtain a certificate of probable cause before they may bring an appeal." (*Hunter, supra,* 100 Cal.App.4th 37, 41.)

"Thus, in this appeal, defendant may raise only those issues cognizable on appeal when a defendant obtains a certificate of probable cause under section 1237.5. '"Obtaining a certificate of probable cause [however] does not make

cognizable those issues which have been waived by a plea of guilty."' [Citation.] Under section 1237.5, 'only "constitutional, jurisdictional, or other grounds going to the legality of the proceedings," survive a guilty plea.' [Citation.] We must determine whether the claimed erroneous denial of a discovery motion brought by defendant is a constitutional, jurisdictional or other ground going to the legality of the proceedings. If it is, defendant may challenge this denial on appeal. If not, defendant's challenge is waived by his plea of guilty." (*Hunter, supra,* 100 Cal.App.4th 37, 41-42.)

"'By pleading guilty, a defendant admits the sufficiency of the evidence establishing the crime, and is therefore not entitled to a review on the merits. [Citations.] "[I]ssues which merely go to the guilt or innocence of a defendant are 'removed from consideration' by entry of the plea." [Citation.] Thus, claims involving sufficiency of the evidence [citation], voluntariness of an extrajudicial statement [citation], a trial court's refusal to disclose the identity of an informant [citation], fairness of a pretrial lineup [citation], and other such issues have been held not cognizable on appeal following a guilty plea. The following particular errors have been reviewed following a plea of guilty: insanity at the time of the plea [citation]; ineffective assistance of counsel [citation]; ineffective waiver of constitutional rights [citation]; erroneous denial of pretrial diversion right [citation]; failure

of prosecution to seek restitution before filing criminal charges in a welfare fraud case [citation]; violation of Interstatement [*sic*] Agreement on Detainers which bars prosecution [citation].' [Citation.]" (*Hunter, supra,* 100 Cal.App.4th 37, 42.)

The discovery motion at issue in *Hunter* sought information "about the informant who provided officers with information that supports the search warrant." (*Hunter, supra,* 100 Cal.App.4th 37, 39.) We concluded the appeal of the discovery motion in that case "does not raise an issue going to the legality of the proceedings. The motion is legally indistinguishable from the nonappealable determinations of the voluntariness of an extrajudicial statement or the fairness of a pretrial lineup described in *People v. Meyer* [(1986) 183 Cal.App.3d 1150, 1156].) Further, the motion is identical to the nonappealable determination of a trial court's refusal to disclose the identity of an informant. (*People v. Hobbs* [(1994) 7 Cal.4th 948], 956 [citing *People v. Castro* (1974) 42 Cal.App.3d 960, 963 (order denying discovery of the identity of the informant in effort to show informant was the guilty party was not cognizable on appeal because it implicated defendant's guilt)].) The common thread in these cases is a challenge to the legality of the evidence gathering process which could then lead to exclusion of evidence that is relevant to the issue of guilt. We conclude[d] the instant motion is not cognizable on appeal." (*Hunter, supra,* 100 Cal.App.4th 37, 42.)

Moreover, in *Hunter*, the discovery motion sought information about a confidential informant so that defendant could challenge a search. This procedural context implicated subdivision (m) of section 1538.5, which provides in relevant part that defendant may obtain review of a search or seizure on appeal " . . . provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence." Since the defendant in *Hunter* did not move for the return of property or to suppress evidence in the trial court, his contention on appeal was barred by subdivision (m) of section 1538.5. (*Hunter, supra,* 100 Cal.App.4th 37, 41.)

In this case, defendant's discovery motion did not seek material that could result in the "exclusion of evidence that is relevant to the issue of guilt." (*Hunter, supra,* 100 Cal.App.4th 37, 42.) Rather, the motion sought evidence of a violation of the equal protection clauses of the federal and state Constitutions, which would mandate dismissal *regardless* of defendant's guilt. (*Murgia, supra*, 15 Cal.3d 286, 294; see fn. 5, *ante*.) "[D]iscriminatory prosecution [is] a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities." (*Murgia, supra,* 286, 298, fn. omitted.) In the words of section 1237.5, the motion raised a "constitutional . . . ground[]" upon which to challenge the "legality of the proceedings."

Moreover, because defendant's discovery motion was not aimed at obtaining information to contest the legality of a search or seizure, subdivision (m) of section 1538.5 is not implicated here, as it was in *Hunter*.

We conclude defendant's claim is cognizable notwithstanding his plea of guilty.

II

Defendant contends his *Murgia* discovery motion was erroneously denied.[5] We are not persuaded.

Section 1054, subdivision (e), prohibits criminal discovery except as provided by statute or required by the United States Constitution. Because no California statute requires the prosecution to disclose information that may support a discriminatory prosecution claim, discovery of information pertinent to a discriminatory prosecution claim is not authorized unless the United States Constitution requires disclosure. (*People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177, 1188.)

In *United States v. Armstrong* (1996) 517 U.S. 456 the court considered what showing a criminal defendant must make to warrant discovery in support of a discriminatory prosecution claim based on the federal equal protection clause. (*Id.* at pp. 458, 461, 464.) The court noted that, in order to succeed

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[5] Apparently confident of their reading of *Hunter, supra,* 100 Cal.App.4th 37, the People unfortunately elected not to address the merits of defendant's contention. This was unhelpful.

on a discriminatory prosecution claim, a defendant "must demonstrate that the . . . prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" (*Id.* at p. 465.) The court held that, in order to compel discovery, the defendant must present "'some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent." (*Id.* at p. 468.) To show discriminatory effect, the defendant must "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not . . . ." (*Id.* at p. 469.)

Paragraphs f through i of defense counsel's declaration referred to incidents of inmates possessing or trafficking narcotics, for the purpose of showing discrimination based on race. We consider the paragraphs in turn.

Paragraph f refers to a 1996 incident at Mule Creek where inmate Ashley was observed to pass marijuana under his cell door to another inmate. No mention is made of Ashley's race. Ashley was referred to the District Attorney for prosecution. Defense counsel declared that he was "not aware that they decided to prosecute inmate Ashley."

Paragraph g refers to a 1993 incident at Mule Creek where inmate Anderson, who is white, was found in possession of methamphetamine and paraphernalia. Counsel declared that the incident was "not prosecuted to counsel's knowledge," which we

construe to mean, counsel lacked knowledge whether Anderson was prosecuted.

Paragraph h refers to a 1987 incident in which inmate Anderson and two other white inmates were involved in a narcotics transaction at Soledad. Counsel declared, "to [his] knowledge, none of the parties was prosecuted," which we construe to mean, counsel lacked knowledge whether any of the inmates was prosecuted.

Because counsel lacked knowledge whether the inmates in paragraphs f, g, and h were prosecuted, the trial court could only speculate whether those incidents represented selective enforcement. "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" (*United States v. Armstrong, supra*, 517 U.S. 456, 465.) Counsel's declarations in paragraphs f, g, and h did not meet this standard; they are not the "clear evidence" that is required to obtain discovery. (*Ibid.*)[6]

Paragraph i refers to inmate Presfield, who is white, and who was suspected of conspiring with defendant to smuggle the drugs involved in this case. The declaration states that Presfield "was brought before an administrative tribunal due to

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[6] In any event, the three prior incidents do not support an inference of discriminatory intent because they were widely separated by time and space, occurring two, five, and 11 years before the motion at two different penal institutions.

his alleged involvement . . . to conspire over the phone to transport drugs into Mule Creek," but the "allegation was found to be unsubstantiated," and "there is no criminal action pending against inmate Presfield . . . ."

Thus, defendant's counsel presented *evidence* of only one inmate--Presfield--who was not prosecuted for drug activity. Because no reason for the lack of prosecution was shown, and the favorable administrative result provides a plausible explanation, the incident is not "clear evidence," or even *any* evidence, of discriminatory intent. (*United States v. Armstrong, supra,* 517 U.S. 456, 468.)

Defendant's reliance on *Bortin v. Superior Court* (1976) 64 Cal.App.3d 873 is misplaced. In *Bortin*, the defendant's counsel conducted an investigation and alleged on "information and belief" that "*no* previous prosecution" for the defendant's offense "has ever been instituted in the City and County of San Francisco." (*Id.* at p. 876.) Here, however, defendant does not claim his investigation had *shown* that the prior incidents were not prosecuted, or that he had been *informed* and therefore *believed* the incidents were not prosecuted. Rather, defendant required the court to speculate as to whether the incidents were prosecuted or not.

Defendant's reliance on *People v. Ochoa* (1985) 165 Cal.App.3d 885 is similarly misplaced. In *Ochoa*, two San Quentin Prison inmates, who believed the prison and the district attorney selectively enforced section 4502 against racial

minorities, filed discovery requests to bolster their evidence of discriminatory law enforcement. (*Id.* at p. 887.) The inmates relied on statistics from the public defender's office showing the percentage of minority inmates at the prison. The appellate court found that the statistical evidence "was not strong," but concluded its weakness "was caused largely by the People's control over more reliable evidence." (*Id.* at p. 888.) Here, in contrast, defendant's evidence regarding the prior incidents was virtually nonexistent, due to defense counsel's lack of knowledge whether the incidents were prosecuted. Unlike the information at issue in *Ochoa*, any criminal prosecution of the prior incidents cited by defendant would have been a matter of public record. Defendant's *Murgia* motion was properly denied.

III

Defendant contends the trial court erred when it concluded that $2,400 was the minimum restitution fine that could be imposed by law. The claim is not reviewable.

The probation report in case No. 98CR0596 recommended a $2,400 restitution fine (§ 1202.4) and a like amount suspended pending successful completion of parole (§ 1202.45). The probation report in case No. 01CR0251 recommended a $600 restitution fine and a like amount suspended pending successful completion of parole.

At sentencing in case No. 98CR0596, the trial court imposed restitution fines as follows: "The Court is imposing a $2400

restitution fine, *which is the minimum by law*, and a further $2400 restitution fine is imposed and stayed pending successful completion of parole." (Italics added.)

In case No. 01CR0251, the trial court reduced the "recommended minimum $600 restitution fine" and the "additional" restitution fine to $200, based on the sentence and the restitution fine imposed in case No. 98CR0596.

Defendant did not object to the restitution fines.

"As a general rule, only 'claims properly raised and preserved by the parties are reviewable on appeal.' [Citation.] [Our Supreme Court has] adopted this waiver rule 'to reduce the number of errors committed in the first instance' [citation], and 'the number of costly appeals brought on that basis' [citation]. In the sentencing context, [our Supreme Court has] applied the rule to claims of error asserted by both the People and the defendant. [Citation.] Thus, all 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review. [Citations.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Contrary to the trial court's assertion, the $2,400 restitution fines were not the "minimum by law." Section 1202.4, subdivision (b)(1), sets the minimum fine at $200 and the maximum fine at $10,000. However, subdivision (b)(2) gives the court discretion to impose a restitution fine of $200 per year of imprisonment. Defendant's $2,400 fine appears to have

been calculated by applying that formula to his 12-year prison sentence. Thus, the fines imposed were squarely within the scope of the trial court's discretion. Defendant's only claim is that the trial court did not understand its discretion and might have exercised it differently had it understood. Because the claim is made for the first time on appeal, it is not subject to review. (*People v. Smith, supra,* 24 Cal.4th 849, 852.)

IV

Our review of the record discloses that the trial court failed to impose the mandatory laboratory analysis fee and associated penalty assessments. Defendant's violation of Health and Safety Code section 11352 made him liable for a $50 criminal laboratory analysis fee (Health & Saf. Code, § 11372.5, subd. (a)), plus a $50 state penalty assessment (§ 1464, subd. (a)), and a $35 county penalty assessment (Gov. Code, § 76000). (E.g., *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1256-1257.) We shall modify the judgment accordingly. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153-1157; *People v. Smith, supra,* 24 Cal.4th 849, 851-854; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413-1416.)

DISPOSITION

The judgment is modified to impose a $50 criminal laboratory analysis fee, plus a $50 state penalty assessment and a $35 county penalty assessment. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended

abstract of judgment and to forward a certified copy to the Department of Corrections.

SIMS, Acting P.J.

I concur:

MORRISON, J.

I concur in the result:

CALLAHAN, J.